

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GADAFFAR PITTMAN,

Defendant-Appellant.

UNPUBLISHED

January 12, 2001

No. 215404

Wayne Circuit Court

LC No. 98-004662

Before: Neff, P.J., and Talbot and J.B. Sullivan*, JJ.

PER CURIAM.

Following a jury trial defendant was acquitted of assault with a dangerous weapon, MCL 750.82; MSA 28.277, but was convicted of possessing a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). She was sentenced to the two-year mandatory term of imprisonment. We affirm.

Defendant argues that the jury rendered an inconsistent verdict by convicting her of felony-firearm but acquitting her of the underlying felony. While defendant properly acknowledges that a jury may render inconsistent verdicts with respect to these charges, *People v Lewis*, 415 Mich 443, 452-454; 330 NW2d 16 (1982), she contends that the verdict in this case requires reversal because the trial court gave erroneous felony-firearm instructions which confused and mislead the jury. We disagree. Because defendant did not object to the allegedly erroneous instruction at trial and approved the instructions given, our review is limited to determining whether defendant has demonstrated a plain error that affected her substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Although the commission or attempted commission of a felony is an element of felony-firearm, it is not required that the defendant be convicted of a felony or the attempt to commit a felony in order to be convicted of felony-firearm. *Lewis, supra* at 454-455; *People v Bonham*, 182 Mich App 130, 135-136; 451 NW2d 530 (1989). The trial court's felony-firearm instruction was therefore erroneous because it informed the jury that it must convict of the underlying felony in order to convict defendant of felony-firearm. *Lewis, supra* at 455. However, defendant has failed to demonstrate the manner in which she was prejudiced by the erroneous instruction. The instruction made it more difficult to obtain a conviction for felony-firearm because it increased

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

the prosecutor's burden of proof. Defendant therefore benefited from the erroneous instruction, and there is no indication on this record that she was harmed. Under these circumstances, defense counsel's failure to object to the instruction likely involved trial strategy. *People v Baker*, 207 Mich App 224; 523 NW2d 882 (1994), where this Court held that error in instructing the jury that a misdemeanor could establish the felony element of felony-firearm resulted in manifest injustice, is distinguishable from the present case. Accordingly, reversal is not required with respect to this issue because defendant has failed to establish a plain error that affected her substantial rights.

Defendant also argues that there was insufficient evidence to support her conviction. Again, we disagree. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). A conviction for felony-firearm requires proof that the defendant possessed a firearm, during the commission of, or the attempt to commit, a felony." *People v Avant*, 235, Mich App 499, 505; 597 NW2d 864 (1999).¹ Here, two witnesses, one of whom was the victim, testified that defendant pointed a rifle right at them during an altercation outside defendant's home. One of those witnesses testified that defendant stated that they "had no business being there" and that she could shoot at anytime while she was pointing the weapon. While defendant maintains that only two people testified that defendant possessed the rifle and that another witnesses testified that he and not defendant had the rifle, questions concerning the weight of the evidence and the credibility of witnesses are appropriately left to the trier of fact. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992); *Avant, supra* at 506. Viewing the evidence in the light most favorable to the prosecution, we hold that a rational trier of fact could conclude that the prosecution proved the elements of felony-firearm beyond a reasonable doubt.

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Talbot
/s/ Joseph B. Sullivan

¹ The elements of felonious assault are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *Avant, supra*, at 505.